No. 95-1873

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY E. ADAMS, ET AL.,

Petitioners,

—v.—

CHARLIE FRANK ROBERTSON and
LIBERTY NATIONAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE STATES OF NEW YORK, VERMONT, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA AND TENNESSEE AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE

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INTEREST OF AMICI CURIAE STATES

The States of New York, Vermont, Arkansas, California, Connecticut, Florida, Hawaii,[1] Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, and Tennessee and the District of Columbia, as amici curiae, respectfully submit this brief pursuant to Supreme Court Rule 37. The case at bar raises important questions relating to the due process protections afforded to "absent", *i.e.*, nonresident, class members who find themselves members of plaintiff classes in class action lawsuits filed in other state courts, even where there are no minimum contacts sufficient to confer jurisdiction on the forum courts. We do not take a position on the merits of the underlying dispute before the Court. Rather, we wish to share with the Court the concerns and perspective on these issues of the state Attorneys General, who are charged with the responsibility of protecting the interests of their citizens.

At the outset, we wish to stress our belief that class action lawsuits are important vehicles that enable the citizens of our States to vindicate legal rights that may have been infringed on a broad scale. At the same time, because vital personal interests of our citizens are often implicated—whether the class action involves allegations (as here) of fraudulent switching of cancer insurance policies, or claims of serious personal injury as in the mass tort context—courts must ensure that the requirements of constitutional due process are met.

The amici States have a number of important interests in the case at bar. Under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), absent class members who do not possess

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[1] Of the states participating, all except Hawaii are represented by the Attorneys General of the respective states. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state. For the sake of simplicity, we will refer to the whole group, including the District of Columbia, as the "Attorneys General" or the "amici States".

minimum contacts with the forum state may be bound by a class action judgment or settlement, but only if certain procedural due process requirements are met. These include the right to opt out (at least where claims for money damages are involved), to be notified of the action and have an opportunity to participate in it, and to be adequately represented. However, in the face of growing concern over the subordination of the interests of absent class members to the interests of others, including class counsel and other individuals competing for monetary relief from the same defendant, the amici States wish to ensure that the protections afforded by *Shutts* are fully and meaningfully implemented. Without these protections, valuable property rights of our citizens may be compromised or even extinguished without the due process of law guaranteed them by the Fourteenth Amendment.

Additionally, we are concerned that citizens of our states will be barred from challenging the jurisdiction of distant forums in our own state courts. Whenever an absent class member is purportedly bound by the outcome of a class action, that member is entitled to challenge the res judicata effect of the class settlement or judgment in another court on grounds of lack of personal jurisdiction of the forum court. However, if, as happened here, a state court can enjoin absent class members from litigating any claim involved in the class action in any forum, this right to challenge the class action forum's jurisdiction will be seriously curtailed, to the detriment of out-of-state citizens.

In presenting these views to the Court, the amici States seek to ensure fairer outcomes for those countless individuals who each year find themselves named as parties in class actions of others' creation.

SUMMARY OF ARGUMENT

It is a fundamental principle of our constitutional system that individuals cannot be bound by a judgment in a litigation to which they are not a party. *Pennoyer v. Neff*, 95 U.S. 714 (1877). The class action device is a limited exception to this traditional rule. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

While this Court has recognized that circumstances may exist which would allow a forum state to exercise binding jurisdiction over the claim of an absent class action plaintiff, due process requires that, at least where substantial monetary interests are at stake, absent class members lacking minimum contacts with the forum state must be provided with minimum constitutional protections, including the ability to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-12.

Given the amply demonstrated potential for abuses in class action settlements, due process further requires that procedural protections for class members be provided in a meaningful way. This includes ensuring that class members receive notice of the settlement that is understandable to lay people and contains sufficient information about the action and any proposed settlement to allow class members to make an informed decision as to whether to retain counsel, opt out, or object. Absentee class members are also entitled to adequate representation, free of the conflicts of interest that have plagued many recent multistate class actions. Thus, if class counsel represents individuals with claims similar to those of class members in separate litigations, the potential for an inherent conflict of interest exists which is inconsistent with adequate representation. Class settlements which extinguish class members' monetary claims but provide excessive attorney's fees for class counsel also suggest the existence of a financial conflict which undermines the adequacy of class representation.

Finally, although an absent class member is always entitled to challenge the res judicata effect of a class action settlement or judgment in another court on grounds of lack of personal jurisdiction, the trial court's order below in fact sought to enjoin any such challenge. In order to prevent such overreaching by forum courts, this Court should find that courts are without power to enjoin plaintiff class members from collaterally attacking a class judgment or settlement for lack of jurisdiction.

INTRODUCTION AND STATEMENT OF CASE

In *Phillips Petroleum Co. v. Shutts*, the Court held that

> a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

472 U.S. at 811-12 (citations and footnotes omitted).

However, in the decade since *Shutts* was decided, a rising tide of criticism about how class actions function in real life has engulfed the legal community and the public at large. Allegations of settlements of little benefit or actual harm to

class members, of collusion between opposing counsel, of conflicts of interest on the part of class counsel, and of incomprehensible notifications to class members have begun to erode confidence in the fairness of class settlements.[2]

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[2] The potential for abuses in class action litigation has been well documented in both the case law and the literature. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 787 (3d Cir. 1995), *cert. denied sub nom. General Motors Corp. v. French*, 116 S.Ct. 88 (1995) (vacating district court's orders certifying settlement class and approving settlement; "[W]ith less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses"); *id.* at 803 (expressing concern that "counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources"); *In re Asbestos Litigation*, 90 F.3d 963, 993-1026 (5th Cir. 1996) (Smith, J., dissenting); *In re Ford Motor Co. Bronco II Prods. Liab. Litigation*, 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litigation*, 526 F. Supp. 887, 893 (N.D. Cal. 1981) (certifying mandatory nationwide class on punitive damages issues due to "unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress"), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A.H. Robins Co. Inc. v. Abed*, 459 U.S. 1171 (1983); R. POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (hereinafter "*Class Wars*"); Coffee, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851 (1995) ("it is increasingly the corporate defendant that wishes to be sued in a class action and—with the help of a friendly plaintiffs' attorney—that often actively arranges for such a suit to be brought by a nominal plaintiff"); Coffee, *Rethinking the Class Action*, 62 IND. L.J. 625, 628-29

In the case at bar, an Alabama state court certified a nationwide class of cancer insurance policyholders and issued an

(1987) (describing potential for conflicts of interest in class action litigation in terms of "agency costs"); Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 813 (1995) (hereinafter "*Individualized Justice*"); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975) (coining phrase "lawyer-entrepreneur" to describe class counsel); Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (hereinafter "*Feasting*"); Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*, 58 U. CHI. L. REV. 1, 7-8 (1991) (class counsel not subject to monitoring by class, operating "largely according to their own self-interest"); Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995) (describing "third stage of concern" about class actions as "mov[ing] beyond a focus on the temptations of class counsel to an analysis of how those opposing the class—that is, defendants and their lawyers—can manipulate those temptations for their own benefit"); Eichenwald, *Class-Action Suit Deadline Expired, Prudential Argues*, N.Y. TIMES, Dec. 11, 1995, at D2; Eichenwald, *Lawyers Receiving $22.6 Million of Prudential Settlement*, N.Y. TIMES, May 20, 1994, at D2; Eichenwald, *Millions for Us. Pennies for You*, N.Y. TIMES, Dec. 19, 1993, at § 3, 1; Henriques, *High Court Hands Corporations Victory on Class-Action Suits*, N.Y. TIMES, Feb. 28, 1996, at D1; Leer, *Thanks to Lawyers, I'm 93 Cents Richer*, SAN DIEGO UNION-TRIBUNE, July 14, 1996, at G3; Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1; Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive*, L.A. TIMES, May 20, 1994, at D1; Phelps, *Attorneys Who Get Paid in Cash Irk Clients Who Get Paid In Scrip*, STAR TRIBUNE, April 17, 1994, at 4D; Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1; Schonbrun, *How Public Can Stop Class-Action Racket*, S.F. CHRON., Oct. 18, 1993, at B3; Walt, *Truck Lawsuit Shifts into Reverse; Attorney Fees Issues Cited in Ruling*, THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Walker, *Class-Action Suits Overdue for Fee Reform*, SACRAMENTO BEE, June 6, 1993, at B7; Weinstein, *Class Action Filings; Often are Lawsuit Abuse*, DALLAS MORNING NEWS, July 28, 1996, at 6J.

order which, among other things, approved a mandatory non-opt-out settlement between the plaintiff class and the defendant insurer, Liberty National Life Insurance Company. A significant portion of the class—approximately 176,000 out of 397,000 class members—was made up of persons residing outside the state of Alabama. *Adams v. Robertson*, 676 So. 2d 1265, 1297 (Ala. 1995) (Appendix). Robertson, the named plaintiff, had originally filed a complaint in the Alabama court alleging unauthorized loans on a life insurance policy. 676 So.2d at 1268.

Thereafter, Robertson amended his complaint to add class action allegations that Liberty National fraudulently induced long-time cancer insurance policyholders to exchange their existing cancer insurance policies for newer policies with higher premiums and significantly reduced coverage. 676 So.2d 1277. Robertson sought money damages on behalf of the policyholders[3] and initially recommended certification of the class under the provision of the Alabama Rules of Civil Procedure that would have allowed persons whose policies had been switched to opt out of the class.[4] Nevertheless, on March 10, 1993, the Alabama trial court preliminarily certified the class under Rule 23(b)(2) **only**, which does not provide for a right to opt out by class members. 676 So.2d at 1278 (Appendix). Thereafter, on February 4, 1994, the Alabama trial court also certified the class under two additional subsections of Ala. R. Civ. P. 23[5] which were not rec-

[3] The class representative's amended complaint stated a claim for monetary damages for fraud, 676 So.2d at 1277 (Appendix), and the motion for class certification confirmed that the action was brought for damages. Jt. App. at 42-44. The petitioners also argued below that class members paid higher premiums on the "new" insurance policies to which they were switched by Liberty National. *See* 676 So.2d at 1272.

[4] The named plaintiff recommended certification under Ala. R. Civ. P. 23(b)(2) and 23(b)(3). Jt. App. at 42-44. Rule 23(b)(3) is the only provision allowing a right of opt-out to class members. Ala. R. Civ. P. 23(b) parallels Fed. R. Civ. P. 23(b).

[5] Ala. R. Civ. P. 23 (b)(1)(A) and 23 (b)(1)(B).

ommended by the named plaintiff in the original class certification motion as the preferable bases for certification. Those sections likewise do not provide for an opportunity for class members to opt out of the class.

On May 26, 1994, the Alabama trial court issued an Order and Final Judgment which, among other things, (a) certified the class for settlement under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2), (b) approved the settlement agreement between the plaintiff class and Liberty National,[6] (c) permanently enjoined class members from litigating any of the dismissed or released claims **in any court**, and (d) approved a fee award to class counsel in the amount of $4.5 million. 676 So.2d at 1302-1307 (Appendix).

Several features of the case at bar illustrate the kinds of problems that have afflicted nationwide or multistate class actions in recent years and that can undermine the device as a method of fairly treating the interests of absent class members. First, despite the presence of substantial monetary claims, this action was certified as a non-opt-out class. Without any finding that absent class members had minimum contacts with Alabama,[7] those class members were forced to accept whatever settlement was approved by a foreign (Alabama) court.

Second, the notice to the class described the settlement in densely printed legalese and was of questionable help in assisting class members in making an informed decision as to whether to object to the settlement or retain an attorney.

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[6] Under the settlement, Liberty National reformed the new policies to provide the same benefits afforded under the old policies and offered to persons who had actually suffered cancer and whose benefits were affected by the switching of policies, up to 150% restitution of monetary benefits lost as a result of the reduction of coverage. 676 So.2d at 1305 (Appendix).

[7] Although the trial court found that the **litigation** had significant contacts with Alabama, the court never found that **absent class members** had minimum contacts with that state. *See* 676 So.2d at 1297 (Appendix).

Third, class counsel appears to have failed to provide adequate representation to the class, at least in part as a result of what has the appearance of a serious conflict of interest. As certified in the settlement jointly proposed by class counsel and Liberty National, the class excluded all insureds who, prior to the certification order, had filed a separate action against Liberty National asserting claims similar to those raised in the class action. 676 So.2d at 1303 (Appendix). Shortly before the trial court preliminarily certified the class, class counsel filed lawsuits on behalf of four of his individual clients.[8] In effect, class counsel managed to obtain an automatic opt-out for those persons whom they successfully removed from the class. Moreover, the named class representative, also represented by class counsel, received a $150,000 payment in settlement of his original claims against Liberty National based upon allegedly unauthorized loans.[9]

Although class counsel's individual clients who were excluded from the class and the named representative were all positioned to receive substantial monetary compensation from Liberty National, the representation afforded to class members appears qualitatively different and deficient: counsel made a settlement for the class that released all of their claims for compensatory and punitive damages, for the most part without any monetary compensation. Add to this the payment of $4.5 million in fees to class counsel, and very substantial doubts are raised as to whether class members were adequately represented.

The Court is urged to respond to the concerns raised in *Adams* with a reevaluation, reaffirmance and strengthening of the due process requirements that shield absent class members from unconstitutional deprivations of their rights. New prob-

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[8] *Gould v. Liberty National Life Ins. Co.*, No. CV-93-024 (Barbour County Cir. Ct. 1993); *Stewart et al. v. Liberty National Life Ins. Co.*, No. CV-93-025 (Barbour County Cir. Ct. 1993).

[9] *See* Petition for a Writ of Certiorari at 10.

lems demand new protections, or at least old protections newly clarified and amplified.[10]

ARGUMENT

I.

AT LEAST WHERE SUBSTANTIAL MONETARY INTERESTS OF ABSENT CLASS MEMBERS WITHOUT MINIMUM CONTACTS WITH THE FORUM STATE ARE INVOLVED, DUE PROCESS REQUIRES THAT SUCH CLASS MEMBERS BE PERMITTED TO OPT OUT OF THE CLASS.

For the purpose of its holding in *Phillips Petroleum Co. v. Shutts*, the Court limited the requirement of the right to opt

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[10] Procedural due process has proven itself to be a flexible, not a static concept. For example, in 1940, in *Hansberry v. Lee*, the Court reserved judgment on what other procedures the Constitution might in the future require, *see* 311 U.S. at 43-44. Ten years later, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court opined that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Then, in 1985, in *Shutts*, the Court further made clear that the rights of absent plaintiff class members include adequate representation and, in actions for damages, the right to opt out. *See also* Schwarzer, *Symposium: Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 843-44 (1995) (recommending that Rule 23(e) be amended to require that when ruling on an application for dismissal or compromise of class action, courts should determine whether notice to class members is adequate, "taking into account the ability of persons to understand the notice and its significance to them"; whether representation of class is adequate, "taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants"; whether opt-out rights are adequate to protect class members; and whether provisions for attorney's fees are reasonable).

out to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. The Court expressly intimated no view concerning the applicability of that right to other types of class actions, such as those seeking equitable relief. *See* 472 U.S. at 811-12 n.3. Assuming that there is a constitutional rationale for hinging a due process right on the remedy sought, the instant case requires further line drawing: how does one tell when a class action for monetary and equitable relief involves claims "wholly or predominately for money judgments"?

When the Court in *Shutts* determined that some procedural rights but not others (such as an "opt-in" requirement) apply to plaintiff class actions, it based its analysis on the interests at stake. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The Court has considered three factors in identifying the "specific dictates" of due process that are required in any particular context: the private interest that will be affected; the risk of an erroneous deprivation of the interest through the procedures used and the probable value of other procedural safeguards; and the government's countervailing interest. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Connecticut v. Doehr*, 501 U.S.1, 11 (1991) (where government is not a party, analysis of governmental interest factor should involve consideration of legitimate interests of private party who is defending procedure in question[11]).

Based on this standard, a court deciding whether a right to opt out should be afforded absent class members must focus on the nature of the claims advanced by the plaintiff class,

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[11] For example, not subjecting the defendant to inconsistent verdicts is a legitimate interest. On the other hand, facilitating collusion between defendants and class counsel obviously is not a legitimate interest.

and the nature of the claims sought to be compromised or extinguished by the defendant. At least where a substantial monetary interest is at stake or at risk of being lost and when the forum court otherwise lacks personal jurisdiction over the absent class members, the right to opt out must apply.[12] It is indisputable that a cause of action is a constitutionally recognized property interest, and as such, its deprivation without the right to opt out risks the denial of due process. *See Mullane*, 339 U.S. at 313 (recognizing cause of action for damages as property right); *Shutts*, 472 U.S. at 807 (affirming that chose in action is constitutionally recognized property interest possessed by each class member); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (Fourteenth Amendment's Due Process Clause prevents states from denying potential litigants use of established adjudicatory procedures, when such an action would be " 'the equivalent of denying them an opportunity to be heard upon their claimed right[s],' " quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). In light of the interests involved, this added protection is necessary to overcome the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. at 40; *accord*, *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 1765-66 (1996); *see also McKinney v. Alabama*, 424 U.S. 669 (1976); *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464 (1918).

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[12] The amici States intentionally focus not on whether the claims are "wholly or predominately for monetary judgments", *Shutts*, 472 U.S. at 811 n.3, but rather on whether there is a substantial monetary interest at stake. Because the value and extent of equitable relief requested or ordered can be inflated by the defendant or class counsel so that substantial monetary claims are made to appear subordinate to equitable relief, we believe that the analysis should focus instead on the significance of the monetary interest at stake.

The right to opt out provides a necessary "safety valve" for those individuals who, for whatever reason, wish to exclude themselves from the binding effect of a class action judgment entered by a foreign and often distant court. Without such a right, absent class members whose claims will be released without monetary compensation, or for inadequate compensation, have no choice but to retain independent counsel and incur considerable expense litigating their objections in a foreign state court. Imposing such a burden on those who lack minimum contacts with the class action forum violates the reasoning of *Shutts* and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Moreover, such a process may force absent class members to submit to the jurisdiction of the foreign court to press their objections. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171 (8th Cir. 1995) (in non-opt-out class action, absent class members appearing *pro se* subjected themselves to forum court's jurisdiction by submitting memoranda on fairness of settlement along with written request to opt out of class).

Because of the critical due process implications, courts should look beyond the particular labels attached to the relief by either the defendant or the class representative and the particular joinder device(s) employed. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) (opt-out right available where foreclosure of substantial claims for damages involved, regardless of fact that class was certified under Rule 23(b)(1) and (b)(2)); *In re Asbestos Litigation*, 90 F.3d at 1004 (Smith, J., dissenting) (distinction in *Shutts* between damage and equitable remedies as affecting extent of procedural protections required by due process must turn on what remedies plaintiff seeks, not on choice of joinder devices). A trial court determination that a class that seeks monetary relief should be certified under Rule 23(b)(1) or (b)(2) cannot serve thereby to limit the due process rights to which class members are entitled. If class counsel and the defendants could avoid *Shutts'*

procedural protections by tacking on a request for an injunction or asserting that the defendant's funds are not unlimited, every class action for monetary damages might be transformed into a non-opt-out class, and *Shutts*' protections would be eviscerated.[13]

The States thus urge the Court to clarify that the right to opt out must be preserved, at least where the class seeks substantial monetary relief, or where substantial monetary interests may be affected by the class judgment or settlement, and where absent class members lack minimum contacts with the forum court.

II.

ALL CLASS MEMBERS ARE ENTITLED TO NOTICE THAT IS MEANINGFUL TO THEM.

In all cases, but particularly where the right of opt-out does not obtain, meaningful notice is key to the class members' ability to participate in or object to a class action settlement or judgment. In determining that due process requires notice to absent class members, the Court in *Phillips Petroleum Co. v. Shutts* held that the notice must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " 472 U.S. at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314-15).

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[13] Even where the class complaint does not seek monetary relief, any determination as to whether absent class members have the right to opt out under *Shutts* should take into account monetary interests that may be compromised or lost as a result of the class action. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873 (1996) (where claims were settled that were not in complaint).

Embedded in this description are at least three notions. Reasonable efforts should be made to ensure that the notice reaches the people to whom it is directed. When it does, it must be "reasonably calculated . . . to apprise." Finally, the notice must afford an opportunity to present objections. While the first requirement focuses on the manner in which the notice is delivered, the second and third requirements go to the **content** of the notice. The notice "must be of such a nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314 (citation omitted); *accord, Greene v. Lindsey*, 456 U.S. 444, 451 (1982).

The qualitative and quantitative content of the notice is crucial. If the notice is not easily understandable to class members, it cannot fairly apprise them of the pendency of the action and afford them an opportunity to present their objections. Likewise, if the notice does not contain all of the information reasonably necessary for a person to decide whether to retain separate counsel, opt out, or object, the fundamental purposes of the notice are undercut. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

According to an important recent study, class action settlement notices do not generally provide the net amount of the settlement or the estimated size of the class: "[r]arely would a class member have the information from which to estimate his or her individual recovery." Moreover, because of the common use of technical language, it appears that "most notices are not comprehensible to the lay reader." Willging, Hooper and Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 134 (1996) (Final Report to the Advisory Committee on Civil Rules) (Federal Judicial Center 1996); *see also* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321 ("The sad truth is that notices issued by courts or attorneys

typically are much too larded with legal jargon to be understood by the average citizen."); Adams, *Deliberate Obfuscation*, FORBES, September 9, 1996, at 152-54.[14]

To ensure, then, that the content of a class action notice is reasonably calculated to achieve the constitutional purposes of the notice, certain minimum standards should be met. The notice should first be written in language that a lay person of reasonable but unexceptional intelligence can be expected to understand, with all necessary disclosures set out clearly and conspicuously. Clear and comprehensible language also serves to minimize the need for individuals in the class to hire their own counsel, thus promoting the end of judicial efficiency in the conduct of the class litigation.

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[14] The Notice of Pendency of Action, Class Action Determination, Settlement and Settlement Hearing in the instant case includes seven pages of close type, to which were attached 23 pages of appendices, including the Order with Respect to Proposed Settlement, the Stipulation and Agreement of Compromise and Settlement, and the Order and Final Judgment. The Notice contains such impenetrable sentences (to the legally uninitiated) as:

> All Class Members who qualify under paragraphs II-10 and II-11 of the Stipulation and who were named insureds under new policies under which any benefit claim has previously been submitted for cancer treatment administered to a covered person, will, if such treatment included radiation, chemotherapy, prescription chemotherapy drugs, or out-of-hospital prescription drugs prescribed in connection with cancer, receive full restitution of any amount by which the total of all benefits *which would have been received* by the Class Member as a result of the cancer treatment *under the old policy* (had the old policy stayed in force) would have exceeded the amount *actually paid* to (or to the assignee of) the named insured Class Member under the new policy.

Jt. App. at 292-93 (italics in original). The court below considered and approved this notice to class members. *Adams*, 676 So.2d 1283-84 (Appendix). However, neither that court, nor any other of which we are aware, expressly addressed the understandability of the class notice as an element of adequacy.

Second, the notice should contain sufficient disclosure of the costs and benefits of participation in the class action to allow class members to make an informed decision as to whether to opt out. When the notice concerns a proposed class action settlement, the required disclosures should necessarily include at least a good faith estimate of the aggregate sum of any monies to be paid to class members and others by the defendant and how these monies would be divided; the rights that class members would lose or waive, and any obligations imposed upon them, by virtue of the settlement; and the amount and method of calculation of all attorney's fees. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (notice sent to over 600,000 truck owners was deficient in that it did not set forth maximum amount of attorney's fees sought by class counsel and specify method of calculating those fees); *cf.* Reduction of Abusive Litigation Act, 15 U.S.C. § 77z-1(a)(7) (in private securities litigation, requiring notice to class members of settlement terms, including amount of aggregate and individual proposed recovery, information on potential outcome of case, and amount and explanation of attorney's fees); S.1887 (104th Cong., 2d Sess.) (Protecting Class Action Plaintiffs Act of 1996) (requiring similar disclosures in class action notices).[15] As the court reasoned in *Bloyed*, notice of the attorney's fees is essential because without such notice, class members cannot gauge the possible influence of the fees on the settlement when they consider whether to object to it.[16] 916 S.W.2d at 958.

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[15] Such disclosures are already required by professional conduct standards. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (attorney who represents two or more clients shall not participate in making an aggregate settlement, unless each client has consented, after being advised of, *inter alia*, existence and nature of all claims involved and total amount of settlement); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (requiring disclosure of existence and nature of all claims and of participation of each person in settlement).

[16] Other courts have similarly rejected class settlements for, *inter alia*, such defects in the notice to the class. *See In re General Motors*

Last, the notice should not contain any language that would unreasonably discourage class members from going to an attorney or objecting to a settlement.

III.

ALL ABSENT CLASS MEMBERS ARE ENTITLED TO REPRESENTATION THAT ADEQUATELY PROTECTS THEIR INTERESTS.

The Court in *Phillips Petroleum Co. v. Shutts* stated that the Due Process Clause "of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry v. Lee*, 311 U.S. at 42-43, 45). This requirement of "adequacy" applies equally to class counsel. *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d at 801; *North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979); *In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980). Last term, the Court reaffirmed this requirement in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761. Also in her concurrence in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. at 890, Justice Ginsburg stressed the "centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement."

The requirement of adequate representation involves more than minimal competence on the part of lawyers; it necessarily requires that class counsel be free of conflicts that might compromise the interests of class members. *See Matsushita*, 116 S. Ct. at 888 n.5 (Ginsburg, J., concurring) (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982), for proposition that Rule 23(a)(4)'s

Corp. Engine Interchange Litigation, 594 F.2d 1106, 1130 (7th Cir. 1979); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980), *cert. denied*, 449 U.S. 1011 (1980).

adequate representation requirement raises concerns about conflicts of interest on part of class counsel); *see also Prezant v. DeAngelis*, 636 A.2d 915, 925 (Del. 1994) (cited in *Matsushita*, 116 S. Ct. at 889) (adequate representative without conflict of interest may present different facts and a different settlement proposal to court than would inadequate representative).

Yet recent class actions have been plagued by a variety of such conflicts of interest, leading to allegations of collusive or otherwise improper conduct on the part of class counsel. *See supra* at 5-6 n.2. In particular, settlement class actions create "unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class." *In re Asbestos Litigation*, 90 F.3d at 1000 (Smith, J., dissenting) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d at 788), and Cramton, *Individualized Justice*, 80 CORNELL L. REV. at 826-27.

The potential for such conflicts inheres in several aspects of the class action as a procedural device. Class members have little or no practical control over class counsel, who in fact often chooses the class representative. *See In re Asbestos Litigation*, 90 F.3d at 1009 (Smith, J., dissenting). Class counsel may decide simultaneously to represent individual class members as well as the class as a whole, giving at least the appearance of gaining a financial interest in settling the class claims for little in exchange for preferential treatment of the individual clients. A similar conflict may arise out of the parallel representation of class members with extant claims, whose interests are served by maximizing their immediate recovery, and those with latent claims, who are benefitted by damage caps that preserve the settlement fund for future claims. *See In re Asbestos Litigation*, 90 F.3d at 1011 (Smith, J., dissenting). In addition, the ability of the presiding judge to guard against conflicts by means of the required fairness

hearing is limited by the judge's unavoidable dependence on counsel for information. *See* MANUAL FOR COMPLEX LITIGATION, THIRD (hereinafter "MCL") § 30.43 (1995) ("Counsel for the parties are the court's main source of information concerning [a class action] settlement.").

In all cases, but particularly where an opportunity to opt out is not afforded, adequate representation must mean more than a "fair deal" being struck to settle a case. No doubt, what a court may view as a "fair" deal could have been much "fairer" if counsel had been free of conflicts.[17]

The existence—or at the very least the appearance—of these conflicts is not theoretical, as can be seen from the instant case. Here, class counsel also represented individuals with the same claims as the class. In a settlement proposal jointly presented by class counsel and the defendants, these individuals were excluded from the class and, as a consequence, unlike the class members, were not required to release their claims for monetary damages against Liberty National. Additionally, the named plaintiff received a substantial payment from Liberty National in settlement of his earlier claims. Moreover, while class members were deprived of the right to seek any monetary, *i.e.*, compensatory or punitive damages, class counsel received $4.5 million in fees. Nothing in the decision below reveals the basis for the court's approval of a fee of that magnitude.

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17 *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result.' " [citation omitted]); *Adams Extract Co. v. Chesapeake Corp. of Virginia (In re Corrugated Container Antitrust Litigation)*, 643 F.2d 195, 211 n.25 (6th Cir. 1981) ("[T]he adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position."); Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part II: The Settlement*, 23 SW. L.J. 765, 771-72 (1969).

The Court should clarify that adequate representation, an important constitutional requirement, is a substantive concept that requires all courts to examine the representation afforded absent class members with reference to objective standards. Adequate representation should be more than a vague or empty concept; it should require more proof than that a licensed attorney has managed to settle (or "cut a deal") with the defendant.[18] The Court should consider taking several steps in furtherance of this goal.

One is to clarify that freedom from conflicts that have a strong likelihood of adversely affecting the representation is an essential element of adequate representation. and that the courts are responsible for guarding against such conflicts. *See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (reversal of criminal conviction warranted for lack of effective assistance of counsel where counsel is burdened by actual conflict). To this end, parallel representation of the class and individuals with similar claims in separate actions against the defendant should be prohibited entirely as inconsistent with adequate representation. *See In re Asbestos Litigation*, 90 F.3d at 1010-11 (Smith, J., dissenting). In the criminal context, this Court has carefully guarded the vulnerable client—the criminal defendant—from his appointed counsel. *See Cuyler*. The Court needs to be at least as protective of vulnerable absent class members who, like most criminal defendants, neither choose their own counsel nor have an ability to monitor their lawyers' performance. Innocent citizens who allege they have been civilly wronged deserve at least as much protection from their lawyers' conflicts of interest as citizens charged with wrongdoing by the State.

Another safeguard is to require—again, as an element of adequacy—that class counsel provide the court with sufficient information on the costs as well as the benefits of any recommended settlement, to allow the reviewing court to make an informed evaluation of the fairness of the settlement. *See*

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18 Koniak, *Feasting*, 80 CORNELL L. REV. at 1115-26.

MCL § 30.43 (counsel must disclose to court any facet of proposed class action settlement that may adversely affect any member of class or result in unequal treatment of members of class).

A third measure to consider, at least in those situations where the potential for harm to the interests of class members is greatest, is the required appointment of an advocate for the class. The advocate would have to have full access to information from class counsel and would be responsible for identifying features of any proposed settlement that are potentially harmful to class interests, and for informing the court of those features. In some past class actions, similar appointments have been made or endorsed. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 310 (court appointed special guardian and attorney for class members); *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Prod. Liab. Litigation)*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (court ordinarily would anticipate appointment of guardian to represent interests of absent class members).

IV.

A COURT MAY NOT, CONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS, ENJOIN ABSENT CLASS MEMBERS FROM CHALLENGING A CLASS SETTLEMENT IN ANOTHER FORUM.

As the Court held in *Hansberry v. Lee*, 311 U.S. 41-43,[19] the constitutional sufficiency of adequate representation in a class action is always open to collateral attack by absent class members.[20] *See also Matsushita*, 116 S. Ct. at 888 (Ginsburg,

[19] *Hansberry* was recently reaffirmed in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761.

[20] This principle logically extends beyond lack of adequate representation to encompass any failure of due process or personal jurisdiction, including lack of adequate notice.

J., concurring) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement.").[21]

One constitutionally problematic aspect of the case at bar is the fact that the Alabama court permanently enjoined class members from participating as litigants in any action where a claim dismissed or released by the class in the settlement was at issue.[22] The effect of this order is to subject class members to contempt for doing what settled principles of due process clearly permit: challenging the jurisdiction of the settling court on the grounds of failing to comply with the dictates of the Constitution. Moreover, to the extent that the Alabama court enjoined absent class members from prosecuting actions in federal court, it lacked the power to do so. *See Donovan v. City of Dallas*, 377 U.S. 408 (1964); *accord, General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

In the case of a class action, a due process infirmity such as inadequate representation or notice makes it virtually impossible for an absent class member to challenge the jurisdiction of the court in the original proceeding. *See Battle v. Taylor*, 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied sub nom.*

[21] *Accord, In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir. 1989), *cert. denied sub nom. Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of the class action scheme."); 7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1789 at 245 (2d ed. 1986) (court conducting an action cannot predetermine res judicata effect of judgment; that effect can be tested only in subsequent action); *see also* NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 16.25 at 133-37 (3d ed. 1992).

[22] The trial court's Order and Final Judgment enjoined all class members from "filing, initiating, asserting, maintaining, pursuing, or continuing or participating as a litigant (by intervention or otherwise) in any action . . . asserting any of the claims dismissed herein or any of the Released Claims . . ." *Adams*, 676 So.2d at 1306 (Appendix).

Taylor v. Liberty National Life Ins. Co., 509 U.S. 906 (1993). Thus, a collateral attack is often the absent class member's only real opportunity to escape a constitutionally defective judgment. Yet that is exactly what the Alabama court's injunction in this case is designed to block. These concerns are heightened where, as here, the court certifies a mandatory non-opt-out class.

Moreover, the order effectively thrusts plaintiff class members into the position of **defendants**, for, like defendants, they bear the risk of liability for damages or worse in the event that they challenge the settlement on jurisdictional grounds and thus disobey the Alabama court.[23] It must also be noted that neither the language nor the reasoning of *Shutts* reaches the circumstance where, as here, absent class members might be subjected to burdens normally imposed on defendants. *See Shutts*, 472 U.S. 810 n.2 and 811 n.3. In sum, without any showing or finding that the absent class members had minimum contacts with the state of Alabama, the Alabama court did not have jurisdiction sufficient to bind plaintiff class members by its injunction.[24]

CONCLUSION

For all of the above reasons, the Court is urged to find that due process requires that absent plaintiff class members (1) have the right to opt out of the class where they have no minimum contacts with the forum, at least when they have sought or stand to lose any substantial monetary interest; (2) must be given notice that is understandable to lay persons and contains sufficient information to allow such persons to make an

[23] According to *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967), one may not lawfully challenge an injunction by disobeying it.

[24] *See In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d at 769 (at least in absence of opt-out right, absent class member without minimum contacts may not be enjoined from relitigation).

informed decision on whether to retain counsel, opt out, or object; and (3) must have adequate representation, free of conflicts of interest. In addition, the Court should declare that no absent plaintiff class member may be enjoined from challenging the jurisdiction of the forum court in a separate action.

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